plaintiff's taxi came right in front of him and there was a collision between the two taxis as a result of which the first defendant's taxi was spun round in a clockwise direction. When the first defendant applied his brakes he was 16 feet away from the second plaintiff's taxi.

In connection with the first defendant's version of the accident it is relevant to note that the brake marks made by his taxi were 66 feet 6 inches in length and he was unable to explain why they were so long.

After considering the two versions and the other evidence in the case, the learned trial judge made a finding of fact that the first defendant encroached on the second plaintiff's path by crossing the centre white line immediately before the accident. The learned trial judge came to the conclusion that the first defendant was wholly to blame for the collision.

Counsel for the first defendant commenced his argument before us by attempting to show that the learned trial judge had erred in finding as a fact that the first defendant's taxi had gone to its wrong side of the road. We are of the opinion that there is no substance in the submissions of counsel for the first defendant on this point.

Counsel for the first defendant went on to argue that the second plaintiff was guilty of contributory negligence.

Before considering this argument, it is useful to refer to the following passage from 28 *Halsbury's* Laws 3rd edition pp. 89, 90 para. 93 which, in our view, correctly sets out the law to be applied to this case:—

"The existence of contributory negligence does not depend on any duty owed by the injured party to the party sued and all that is necessary to establish a plea of contributory negligence is to prove that the injured party did not in his own interest take reasonable care of himself and contributed by this want of care to his own injury.

The principle involved is that, where a man is part author of his own wrong, he cannot call on the other party to compensate him in full. The standard of care depends upon foreseeability. Just as actionable negligence requires the foreseeability of harm to others, so contributory negligence requires the foreseeability of harm to oneself. A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonably prudent man, he might hurt himself."

In the present case the evidence shows that the two taxis were on a straight stretch of road and that visibility was good. The fact that the first defendant's taxi left brake marks which were 66 feet and 6 inches in length on the road indicates that the first defendant swerved to the right some distance before the commencement of the brake marks. In spite of this, the second plaintiff did not see the on-coming taxi until it was about 30 feet away from him. There is also the fact which was found by the learned trial judge that the first defendant's taxi did not encroach very far into the wrong side of the road. In view of all these considerations, we are of the opinion that the second plaintiff did not in his own interest take reasonable care of himself and contributed by this want of care to his own injury.

In the circumstances of this case we apportion the fault as to one-fourth to the second plaintiff and as to three-fourths to the first defendant. The damages awarded to the second plaintiff should be reduced accordingly. The evidence shows that the second plaintiff was not a servant of the first plaintiff; the second plaintiff had hired the taxi from the first plaintiff and was driving it for the purpose of carrying passengers for profit on his own account. The damages awarded to the first plaintiff therefore remain unaltered.

The appeal is allowed to this extent and the judgment of the learned trial judge varied in the manner indicated.

Appeal partly allowed.

Solicitors: *Battenberg & Talma; M.P.D. Nair.*

THAMBIPILLAI v. THE GOVERNMENT OF MALAYSIA

[O.C.J. (Wan Suleiman J.) June 15, 1969]
[Alor Star — Civil Suit No. 219 of 1966]

Administrative Law — Compulsory retirement — Whether dismissal — Whether termination of service amounts to punishment — Pensions Ordinance, 1951, s. 10(a) — Constitution of Malaysia, art. 135(2).

In this case the plaintiff who was 58½ years old was required to retire under section 10(a) of the Pensions Ordinance, 1951. The plaintiff contended that he was entitled to remain in service until he had attained the age of 60 years, in accordance with the service circular No. 6 of 1961, and that therefore the compulsory retirement was bad in law and therefore void and inoperative

Held: (1) the decision to retire the plaintiff could validly be made under section 10(a) of the Pensions Ordinance by the Principal Establishment Officer under powers delegated to him by the Yang di-Pertuan Agong;

(2) the compulsory retirement under section 10(a) of the Pensions Ordinance is not equivalent to dismissal and the plaintiff was therefore not entitled to be given a reasonable opportunity of being heard before he was compulsorily retired

Cases referred to:—

(1) *Shyamlal* v. *State of Utter Pradesh* A.I.R. 1954 S.C. 369; [1955] 1 S.C.R. 26.

(2) *P.L. Dhingra* v. *Union of India* A.I R 1958 S.C. 36; [1958] S.C.R. 828.

CIVIL SUIT.

G. Moganasundram for the plaintiff.

Ajaib Singh (Senior Federal Counsel) for the defendant.

Cur. Adv. Vult.

Wan Suleiman J.: The plaintiff, a technical assistant special grade, employed in the Public Works Department, Perlis, who was born on 18th November, 1907 and was therefore about 1½ years short of his 60th birthday on the 12th May, 1966 was required to retire under section 10(a) of the Pensions Ordinance, 1951.

It is his contention that he is entitled to remain in service until he had attained the age of 60 years, and that therefore the compulsory retirement is bad in law and is therefore void and inoperative.

Alternatively he claims that he has been wrongfully dismissed, and that there is therefore a breach of contract of service on the part of the defendant.

The statement of claim was subsequently amended to include two new paragraphs which alleged that the purported retirement or wrongful dismissal had been brought about by the then executive engineer, Perlis, who had acted in bad faith, in consequence of which the plaintiff had been deprived of his constitutional rights. Evidence was led at the trial on the issue of *mala fides*, but since learned counsel for the plaintiff in his closing address stated that he was abandoning this issue, I need not dwell upon this matter beyond saying that I am satisfied on the evidence that far from being actuated by bad faith, the executive engineer had every reason to be dissatisfied with a subordinate who was no longer physically and professionally competent to carry out his duties.

That leaves only the issues of law to be considered. Mr. Moganasundram, for the plaintiff, contends that Service Circular No. 6 of 1961 issued by the Principal Establishment Officer is law and that the compulsory retirement of the plaintiff before he was 60 years old amounted to a dismissal and is contrary to article 135(2), by which I think he means that the plaintiff cannot be dismissed without being given a reasonable opportunity of being heard.

Service Circular Letter No. 6 of 1961 reads as follows:—

"I am directed to inform you that Government has decided that with effect from the 1st October, 1961, the age of retirement should be raised from 55 years to 60 years in respect of all officers in the Public Service of the Federation of Malaya, including both male and female officers. This decision however. does not apply:—

(a) to those officers who, by any written law in the Federation, are permitted to retire on attaining a later age than 60 years;

(b) to entitled officers under the Malayanisation Scheme; and

(c) those officers who have already been called upon to retire and/or who have already proceeded on leave prior to retirement before the 1st October, 1961.

2. Although a slight amendment to the Pensions Ordinance, 1951 may be necessary in the light of Government's decision that the retiring age should be 60 years, the existing provisions of the Pensions Ordinance will, however, remain unaltered with regard to the age for optional retirement, maximum pension eligibility, calculation of pension, payment of gratuity etc.

3. Pending their revision, it will now be necessary to read the following circulars in the light of the decision that as from 1st October, 1961 officers shall be required to retire from the public service on attaining the age of 60 years:—

FEO. Circular Letter No. 5/56.
Service Circular Letter No. 8 of 1959.
Service Circular No. 2 of 1960."

and was addressed to secretaries to Ministries, State secretaries and heads of federal departments.

It is not in dispute that the decision to retire the plaintiff was made, as the defendant's witnesses disclosed, under section 10(a) of the Pensions Ordinance, 1951 by the Principal Establishment Officer himself under powers delegated to him by His Majesty the Yang di-Pertuan Agong. (See L.N. 307/1963).

What then is the status of Service Circular Letter No. 8 of 1961?

The relevant portion of article 132(2) of the Constitution reads as follows:—

"Except as otherwise expressly provided by this Constitution, the qualifications for appointment and conditions of service of persons in the public services other than those mentioned in paragraph (g) of Clause (1) may be regulated by federal law and, subject to the provisions of any such law, by the Yang di-Pertuan Agong; . . . ."

In respect of pensions which in my view comes under the term "conditions of service" the relevant federal law is the Pensions Ordinance, 1951. Service Circular Letter No. 6 of 1961 can be no more than a mere declaration of policy to raise the retiring age to 60 years. For whatever it is worth the reference to a need to amend the Pensions Ordinance, 1951 in para. 2 of the service circular is an indication that the need to amend the Federal Laws regulating pensions in consequence of this new policy was contemplated. It is unfortunate for the plaintiff that no such amendment has been made but I cannot see how a mere expression of policy can be regarded as law touching upon conditions of service made by the Yang di-Pertuan Agong. I would go further and say that even if it had indeed been made under article 132(2) it would

nevertheless have to be read "subject to the provisions" of the Pensions Ordinance, 1951, so that in the event of conflict between the two, the Pensions Ordinance would prevail.

It also seems to me that compulsory retirement under section 10(a) of the Pensions Ordinance, 1951 could hardly, by any stretch of imagination, be equivalent to a dismissal so as to entitle the plaintiff to a reasonable opportunity of being heard in accordance with article 135(2) of the Constitution.

Clauses (1) and (2) of article 311 of the Constitution of India are in substance the same as article 135(1) and 135(2) of our Constitution, and reads as follows:—

"311. (1) — No person who is a member of a civil service of the Union or an all-India service or a civil service of a State or holds a civil post under the Union or a State shall be dismissed or removed by an authority subordinate to that by which he was appointed.

(2) No such person as aforesaid shall be dismissed or removed or reduced in rank until he has been given a reasonable opportunity of showing cause against such action proposed to be taken in regard to him."

[The provisos to article 311(2) are not relevant to the facts of the present case.]

In view of the similarity abovementioned, decided cases pertaining to article 311 have been recognised as a valuable source of guidance by our courts.

In *Shyamlal* v. *State of Utter Pradesh*,[1] article 465A of the Civil Service Regulations, was invoked to compulsorily retire an engineer, it being alleged that he had committed certain misdemeanours of a departmental nature which were enumerated in a letter asking him to explain within three weeks why he should not be compulsorily retired under the provisions of that article. The plaintiff submitted his explanation which together with his superior's comments were placed before the relevant Public Services Commission. The Commission came to the conclusion that five out of the six charges have been proved and submitted their report accordingly, as a result of which the President made an order compulsorily retiring the plaintiff. Article 465A(2) reads as follows:—

"A retiring pension is also granted to an officer who is required by Government to retire after completing 25 years qualifying service or more."

To this there is added a note to the following effect:—

"Government retains an absolute right to retire any officer after he has completed 25 years qualifying service without giving any reasons, and no claim to special compensation on this account will be entertained. This right will not be exercised except when it is in the public interest to dispense with the further services of an officer."

The appellant's petition to the High Court to have the President's order set aside on the ground *inter alia*, that the order was illegal and void in that it was made without affording him an opportunity to show cause against the action proposed to be taken against him, was dismissed.

On appeal the Supreme Court held that compulsory retirement does not amount to dismissal or removal and therefore does not attract the provisions of article 311 of the Constitution.

In another Supreme Court decision *P.L. Dhingra* v. *Union of India*,[2] the scope of the protection afforded by article 311 of the Indian Constitution was again considered. It was held, *inter alia*:—

". . . . that it is only in those cases where the Government intends to inflict those three forms of punishments that the Government servant must be given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him. It follows therefore that if the termination of service is sought to be brought about otherwise than by way of punishment, then the Government servant whose service is so terminated cannot claim the protection of art. 311(2)."

The three forms of punishments abovementioned are signified by the words "dismissed", "removed" and "reduced in rank" in article 311 (2), the former two words corresponding in meaning to the word "dismissed" in our article 135(2).

A test for determining when termination of service amounts to punishment is then given:—

"One test for determining whether the termination of the service of a Government servant is by way of punishment is to ascertain whether the servant, but for such termination, had the right to hold the post. If he had a right to the post . . . , the termination of his service will by itself be a punishment and he will be entitled to the protection of art. 311."

Applying this test to the present action, I fail to see how the plaintiff can be regarded to have a right to hold his post in view of the clear provisions of section 10(a) of the Pensions Ordinance, 1951, once he had passed his 55th birthday. That being so, his compulsory retirement does not amount to punishment and therefore the right to be heard under our article 135(2) cannot arise.

I therefore find that the plaintiff has lawfully been retired from the public service and accordingly this action is dismissed with costs, which by reason of the nature and importance of the case, is to be on the higher scale.

Action dismissed.

Solicitors: *Yeoh Kian Teik & Co.*